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ON COPYRIGHT
Copyright cultures

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Abstract

Purpose – This column aims to look at the different economic and intellectual approaches to copyright as separate cultures whose assumptions and approaches make it difficult for them to share a single copyright law.

Design/methodology/approach – The methodology relies heavily on anthropological analysis to distinguish the expectations and language of subgroups and microcultures within the larger national and international copyright communities.

Findings – At least three different copyright cultures exist: for authors who require long-term protection for financial gain from their works; for authors who require short-term protection for financial gain from their works; and for authors whose value depends on access instead of protection. Important subsets of the author cultures are also copyright consumers whose interests require access as well as protection.

Originality/value – This analysis helps to show why existing copyright laws serve the interests of some groups better than others. It also explains why open access makes sense as an established legal alternative to automatic long-term copyright enforcement.

Keywords Copyright law, Risk assessment, Law enforcement

Paper type Case study

Introduction

> Copyright is more than a term of intellectual property law that prohibits the unauthorized duplication, performance or distribution of a creative work. To artists, "copyright" means the chance to hone their craft, experiment, create, and thrive. It is a vital right, and over the centuries artists, such as John Milton, William Hogarth, Mark Twain, and Charles Dickens, have fought to preserve that right (RIAA, 2003).

The Recording Industry of American (RIAA) is one of the most aggressive defenders of intellectual property in the US today. In this summary of their copyright position, they depict the issue in cultural terms and link it with the works of famous people. They neglect to mention what a tiny portion of the artistically and intellectually creative population benefits from restrictive copying practices. Their job is to protect the intellectual products of the rich and famous and those who managed to secure lucrative rights from authors, which is not quite the same as encouraging creativity and experimentation.

Their language evokes the fundamental basis for copyright in the US constitution:

> The Congress shall have Power… To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries (US Constitution, 2004).

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Their claim could be true if protection for those who make money from their writings and discoveries were the only way to promote the progress of science and the useful arts in the modern world of internet communication. Nowadays, the claim may well be more myth than reality.

This paper looks more broadly at groups whose copyright culture has the same purpose as expressed in the US constitution, and asks whether their economic interests have protection within the legal systems of the USA and other developed countries?

Note that this paper looks only at copyright laws and not patent or trademark laws, where the legal and social situations are quite different.

Methodology

This paper uses a standard anthropological methodology in which the observer interacts with members of a particular community to observe cultural traits and characteristics that distinguish one part of the community from another. While this methodology has typically been applied to anthropologists in non-Western cultures, it can also work in our own culture. The observation problem within one's own culture grows from the lack of distance and the readiness to accept its myths. As Clifford Geertz (1995, p. 3) wrote:

> Myth, it has been said, I think by Northrop Frye, describes not what has happened but what happens. Science, social science anyway, is much the same, save that its descriptions make claim to solider grounding ...

Myths serve contemporary culture as much as they serve Pacific Islanders and served our ancient forbearers, but our own myths can be hard to see. If, for example, it is a myth that copyright protection, especially long-term protection, is necessary to promote the advancement of knowledge, then the anthropologist needs to explain what reality it enshrouds.

In my role as anthropologist observer, I have in particular had contact with the academic portion of the authorial community, and to a somewhat lesser extent with filmmakers, though also in an academic context via both public television (in the USA) and videos created by my own staff. This paper grows largely from these experiences. These populations represent, however, a significant portion of the copyright-protected materials is in existence nowadays. Would anyone really claim that more authors make the bulk of their living from royalties than from academic paychecks? It seems unlikely.

Best-seller copyright culture

The framers of the world's copyright laws have tried over the years to harmonize them to create a relatively consistent framework for the international publications trade. This harmonization served the interests of rights holders of works that sold internationally and made money over long periods. These rights holders were not necessarily authors. Frequently, they were corporate entities to which authors had assigned rights in return for a modest, token or even non-existent payment. These corporate entities obviously added value and played a role in the ongoing distribution of these intellectual creations, but a claim that royalties flowing to them is the same as support for authors eager to experiment seems disingenuous – with a few exceptions.

These exceptions are authors whose record of past sales and prospect of future ones are so good that they have the leverage to retain their copyright and to win a

publication contract that provides both an income for life and a pension for their heirs until 70 years after their death. Survivor rights are a common feature of pension plans, but under most plans only spouses can benefit for the remainder of their lifetimes, and relatively few spouses live 70 years beyond their partner.

These authors include all of the famous names that the RIAA listed: John Milton, William Hogarth, Mark Twain, and Charles Dickens. It is myth, however, that any of them benefited from the current life-plus-70 copyright term. Milton died in 1674, before even the Statute of Anne (1710), the first formal British copyright law. And Charles Dickens, who died in 1870, complained particularly about American publishers stealing his works. Those were not thefts by student infringers, but deliberate US copyright policy at the time:

> As the historian Doron Ben-Atar shows in his book "Trade Secrets," the Founders believed that a strict attitude toward patents and copyright would limit domestic innovation and make it harder for the US to expand its industrial base (Suroweicki, 2007).

This does not mean that the protection does not benefit best-selling authors like Mark Halprin nowadays, but the existing US law is too new to demonstrate any tangible positive effect on the generation of great novels based on expectations that the author's heirs would benefit 70 years after their own deaths. In Germany, the life-plus-70 rule is significantly older. It would be interesting to see evidence that this long after-death protection period serves as an incentive for individuals, as opposed to corporate owners of the usage rights.

Beyond the mythic implication that the long protection period is good for authors and their families lies the economic fact that corporations need (or feel they need) the long protection period to recover costs for certain forms of very expensive creations – movies are a good example. Most major movies cost millions to make and represent the intellectual collaboration of hundreds of people. Some movies repay the investment immediately, others only over a very long time, and far more never do. A movie studio must have the long-term gain from hits to cover the losses from flops. The same is true for book publishers, which survive on the basis of a few successes that cover the losses from risks have gone bad.

The cultural assumption that all copyright terms should be the same does not fit this economic reality, in which only a few key works, the Mickey Mouse style hits, really need long-term protection to give the studios a "chance to hone their craft, experiment, create, and thrive" as the RIAA says. A mechanism to release rights to the other works would do little harm. A few films and books sell badly initially but resurface later as classics. It would be interesting to see a study of how often that happens and under what circumstances. The odds are strongly against future value for any present failure, but the economic cost of keeping the rights is nil. The effort to release them would cost more.

Short-term-sales copyright culture

The key characteristic of works belonging to this copyright culture is that they made money at best for a few years. They needed some protection, but not anything resembling the life of the author plus 70 years. After 10 or 20 years they were often no longer in print, no longer available in video stores, perhaps no longer even on a format that modern devices can play, like music on a vinyl long playing record or a CPM-based video game.

Before the 1978 copyright law in the USA, these works had to meet the legal definition of publication and generally had some corporate entity that served as publisher. They also had a relatively short protection period: 28 years from the date of publication. Renewal was possible, but not worthwhile if it were clear that the economic value to the rights holder had fallen to nothing. In a sense, the US law recognized this short-term sales copyright culture and did not protect rights too long beyond the point when any revitalization in their value would be obvious. In Germany and more broadly within Europe, the laws did not recognize this group. All protection periods were equal.

Now, lawmakers in the USA and elsewhere are contemplating how to address the issue of orphan copyrights. Works within this short-term copyright culture fall readily into the orphan category, because it costs time and effort to make sure that anyone who wants to contact the rights holders can find them. The lack of current contact information is a problem for those who want to use these orphaned works, but is a matter of general indifference to the rights holders.

This is not a category that authors would necessarily choose. If an author has created a work to make money, the hope that it will keep selling is ever present. The reality is, however, that far more works fall into this group than in one where long-term protection matters. I wrote a book on using expert systems to automate mainframe management back in 1990. It made money for me for two years and then fell out of print a few years later. Mainframes were not quite gone, but had become legacy machines, and newer, more complex, faster expert systems replaced the ones that I had used in my examples. The work is not an orphan, since the publisher (McGraw-Hill) continues to flourish, and I am readily findable online. Whereas, I have no serious hope of seeing the book reprinted as part of my posthumous collected works, nor did I ever think it would have any economic value beyond the few years that it did. Were a copyright renewal required for ongoing protection, I would not bother.

The idea that a long protection period helps these authors seems particularly mythical when part of their new creation requires incorporating the works of others. This group can include movie producers who want to quote clips from past works or visual artists who reproduce someone else's work. The rules for this form of citation are far more restricted in oral and visual than in textual works. Authors with plenty of money can buy the rights. Those without financial resources find their inventiveness inhibited.

Pure-prestige copyright culture

The desire to reach an audience rather than to make money from royalties characterizes this copyright culture, and it is certainly the majority within the academic community. Only in myth do more than a trivial number of academic authors make their money directly from royalty payments. They make it indirectly from the prestige and status of publishing, and they profit from their writings through the tenure and promotion process in North American universities, or through the process of acquiring a professorial chair in European universities. In both cases, when viewed over career-long stretches of time, the incremental accretion of peer-reviewed, much read, well-cited, influential articles and books has a measurable impact on the bottom line of an academic income.

These authors also benefit economically in ways that do not always appear on their income tax statements. For example, authors whose works have a high impact according to the measures of their disciplines are likely also to have a better chance at winning grant money. Grant money is not personal income, but it provides economically valuable resources to do things that the author wants, including hiring staff, acquiring computing or laboratory equipment, and traveling to conferences or research sites. This means that the author does not have to spend personal funds on these goals, a saving that represents a non-taxable increase in personal resources.

People in this copyright culture want protection for their moral rights, such as the right of attribution. This protection is essential for the value that they expect to get from their works. They also want to keep others from taking their works and just using or copying them except in a context where they as authors get appropriate academic credit. Copyright as a protection against plagiarism matters to them, just as copyright protection that keeps people from reading their work harms their interests.

This preference puts authors in this copyright culture at odds with publishers, who spend money to make the works available and expect some fair return. In the past when publishing in a standard paper journal with all of its associated costs, these authors accepted the idea that they had to assign their rights in order to provide a reasonable incentive for the publisher to take their works. With electronic publishing the actual costs of running a peer-reviewed journal do not fundamentally change, since the costs of maintaining a web presence is arguably equal to or greater than printing and mailing, but the perception has changed, in part because the internet infrastructure masks costs much as the highway system makes it seem as if travel by car is cheap.

For authors at universities that provide a workstation, server space, internet access, and the staffing to support this infrastructure, institutional publication in the form of repositories, personal web pages, or university-supported electronic journals makes economic sense. This is especially true in fields where tight discipline-based interconnections reduce the need for advertising and branding. The myth that I used to hear frequently in meetings that internet-based publishing costs nothing appears to have dissipated as information about the real costs of open access journals have become available.

In general, academic authors and others who write for prestige, not for royalties, would benefit from a shorter protection period. The period during which most academic works make an economic difference to their creators is comparatively short. Works more than ten years old may still have value within a discipline, but probably will not win their author a promotion or better position unless other publications have followed them. Thirty years after publication, the odds are that an academic author has retired or is approaching retirement. The works typically have no economic value to the heirs after the author dies. Current copyright terms make no sense for them.

Conclusion

The current copyright laws and the life-plus-70 protection term expresses the interests of only one of several copyright cultures. It works well for best-selling authors and their heirs and for the corporations that acquired rights to their works. For them, myths about the freedom to experiment, create, thrive and hone their craft represent a plausible economic reality.

For other authors in other cultures whose royalties expire after a few years, or who benefit economically mainly from the prestige of publishing, the long protection period provides no clear positive incentive beyond the occasional illusory hope of best-seller status. For them, long-term restrictions can actually be a problem because they keep them from using other works in their own.

Communication between these cultures is poor in part because they accept assumptions built into the international legal systems that there is only one copyright culture and one copyright law that fits all. The groups talk past each other as if they alone represented authors everywhere.

The economic reality beyond the social myth is that the corporate owners of intellectual property have a conservative urge to maintain ownership, even after the roof of their intellectual property has collapsed and the foundation crumbled. Property is property, and people cherish the right to keep and neglect it. This is not likely to change.

What could change as a result of recent legislative activity to deal with orphan copyrights is a realization that a shorter but extendable protection plan might serve the social aims of advancing knowledge and encouraging creativity better than the existing system. As a social scientist, I would not bet on it, however.

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